

INNOTEK ASIA PACIFIC SDN BHD

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v.

INNOTEK GMBH

HIGH COURT MALAYA, KUALA LUMPUR

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RAMLY ALI J

[ORIGINATING SUMMONS NO: D5-24-268-2006]

14 FEBRUARY 2007

CIVIL PROCEDURE: *Injunction - Application for - Arbitration proceedings - Application to restrain defendant from commencing with arbitration proceedings in Germany - Whether arbitration clauses stipulated in agreements void for uncertainty - Whether there was a serious question as to 'venue' of arbitration - Whether precise seat of arbitration made certain with reasonable certainty - Whether law of agreements Malaysian law - Issue of validity of appointment of arbitrator - Whether a serious question to be tried - Balance of convenience - Whether in favour of a grant of injunction - Whether court could invoke s. 21 Contracts Act 1950 - Whether a case justifying an anti arbitration injunction - Arbitration Act 2005, ss. 3, 9, 10*

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CIVIL PROCEDURE: *Stay of proceedings - Application for - Arbitration proceedings - Application for stay of proceedings pursuant to s. 10 of Arbitration Act 2005 - Whether language of s. 10 of the Arbitration Act 2005 does not exclude jurisdiction of the court to stay proceedings for the purpose of referring the matter to arbitration based on agreement - Requirement to stay - Whether mandatory - Whether s. 3 of the Arbitration Act 2005 does not expressly exclude the power of the court to stay proceeding for the purpose of referring the dispute to international arbitration - Whether arbitration agreements within meaning of s. 9 Arbitration Act 2005 and German Code of Civil Procedure - Whether German laws to be the law of agreement - Appointment of arbitrator - Whether valid - Whether facts and circumstances justified for a grant of stay of proceedings - Arbitration Act 2005, ss. 3, 10(a), (b)*

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CIVIL PROCEDURE: *Arbitration - Arbitration proceedings - Injunction - Application to restrain defendant from commencing with arbitration proceedings in Germany - Whether arbitration clauses stipulated in agreements void for uncertainty - Whether there was a serious question as to 'venue' of arbitration - Whether precise seat of arbitration made certain with reasonable certainty - Whether law of agreements Malaysian law - Issue of validity of appointment of arbitrator - Whether a serious question to be tried - Balance of convenience -*

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- A *Whether in favour of a grant of injunction - Whether court could invoke s. 21 Contracts Act 1950 - Whether a case justifying an anti arbitration injunction - Arbitration Act 2005, ss. 3, 9, 10*

- CIVIL PROCEDURE:** *Arbitration - Stay of proceedings - Application for - Application for stay of proceedings pursuant to s. 10 of Arbitration Act 2005 - Whether language of s. 10 of the Arbitration Act 2005 does not exclude jurisdiction of the court to stay proceedings for the purpose of referring the matter to arbitration based on agreement - Requirement to stay - Whether mandatory - Whether s. 3 of the Arbitration Act 2005 does not expressly exclude the power of the court to stay proceeding for the purpose of referring the dispute to international arbitration- Whether arbitration agreements within meaning of s. 9 Arbitration Act 2005 and German Code of Civil Procedure - Whether German laws to be the law of agreement - Appointment of arbitrator - Whether valid - Whether facts and circumstances justified for a grant of stay of proceedings - Arbitration Act 2005, ss. 3, 10(a), (b)*
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- The dispute between the parties was in relation to a partnership contract and resellers agreement to both of which the plaintiff and the defendant were parties. Enclosure 13 was the plaintiff's application for an injunction against the defendant restraining the defendant from commencing and/or further proceeding with arbitration proceedings in Germany, while encl. 21 was the defendant's application for stay of proceedings pursuant to s. 10 of the Arbitration Act 2005 (the Act). These were the two applications before the court. The grounds relied upon by the plaintiff in support of its application were (i) that the arbitration clauses as stipulated in the agreements between the parties were void for uncertainty under Malaysian Law (and presumably under German Law) for 'SIHK' referred to in these agreements could mean many different institutions and in essence, the plaintiff contended that there was a serious question as to the 'venue' of arbitration; (ii) the law of the agreements should be Malaysian law; (iii) that the appointment of arbitrator was invalid. The plaintiff further contended that the balance of convenience swayed in favour of a grant of injunction on the basis that the arbitrator would proceed to be conducted under an unfavourable system of laws (German) and the arbitration would involve great expenses being incurred by the plaintiff. Further and in any event, the plaintiff argued that the Malaysian Courts have the jurisdiction to hear the dispute. The plaintiff had also sought to raise an alternative argument that the arbitration clause in the agreements were void for 'both the parties to the agreements were under a
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mistake as to a matter of fact essential to the agreement' and relied on s. 21 of the Contracts Act 1950. As for encl. 21, the plaintiff objected by contending that the defendant had acted in breach of the agreement and had filed the underlying action with a view to compelling performance of the agreements. The plaintiff also submitted that the defendant's application herein, pursuant to s. 10 of the Arbitration Act 2005 was misconceived in the predominant ground that the Act does not apply to arbitration held outside Malaysia. The defendant argued that the jurisdiction to grant a stay was vested under s. 23 Court of Judicature Act 1964 ('CJA'). The grounds relied upon by the plaintiff in objecting the stay application were (a) that the arbitration clause was void for uncertainty; (b) the law of the agreements should be Malaysian Law and (c) the defendant had failed to abide by the relevant procedure on the appointment of an arbitrator.

Held (dismissing plaintiff's application in encl. 13 and allowing defendant's application in encl. 21):

(1) In construing an agreement, the court should not hold a provision to be void for uncertainty unless it cannot resolve the ambiguity which it is said to contain (*Fawcett Properties Ltd v. Buckingham County Council*). There was no uncertainty as to whether 'SIHK' referred to the other localities as identified by the plaintiff. Even if the seat of arbitration was uncertain, it was capable and/or readily of being made certain with reasonable certainty. A contract of which there could be more than one meaning or which when construed could produce in its application more than one result was not void for uncertainty, so long as the language was not so obscure and so incapable of any definite or precise meaning that the court was unable to attribute to the parties any particular contractual intention. (paras 16, 17, 18)

(1a) The facts herein were as such that the precise seat of arbitration could be made certain with reasonable certainty. The defendant had understood 'SIHK' to mean at all times as referring to the *Sudwestfälische Industrie –und Handelskammer* or the *Chamber of Industry and Commerce of Southern Westphalia*, as the law of the agreements was German law, the arbitration clause met the formal requirements of the German Code of Civil Procedure, the manner in which the parties transacted were reflective of German Law, the other localities identified by the plaintiff in interpreting 'SIHK' had

- A no bearing on the relationship between the parties, the plaintiff had at no point in time ever objected to the inclusion of such arbitration clauses in the agreements and the agreement had been executed by the parties on their own free will. There being no uncertainty as to the venue of arbitration, the issue in relation to the 'venue' of arbitration therefore did not present a serious question to be tried. (paras 19 & 20)
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- (2) Section 30(4) of the Arbitration Act 2005 expressly provides the arbitral tribunal the power to determine the law applicable in an arbitration by the conflict of laws rules. Thus, it was necessary and reasonably implied that the arbitrator and/or arbitral tribunal had the jurisdiction to decide on any dispute as to the law applicable in such arbitration. In determining the applicable substantive law, the arbitral tribunal will infer from the circumstances the system of law with which the transaction had its closest and most real connection. In any event, it was understood and/or it was readily inferred from the agreements that German Law was to be the law of the agreements. In this regard, there was no basis for the inference that Malaysian Law was the law of the agreements and any basis for such inference advanced by the plaintiff was without merit. Further, the defendant was a corporation established under the laws of Germany and having its base of operations in Germany. It was therefore held that the issue of applicable laws would not present a serious question to be tried. (paras 21, 22, 23 & 24)
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- G (3) All procedures in the German Code of Civil Procedure in respect of the appointment of arbitrator have been duly complied with. A complaint has been registered with SIHK. It was now for SIHK to take all necessary further steps including those going to the appointment of arbitrator. The issue of validity of appointment of arbitrator would not present a serious question to be tried. (para 25)
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- (4) There was no question of there being an application of an 'unfavourable system of law.' This suggestion by the plaintiff was wholly unsubstantiated. That the arbitration would involve great expenses being incurred by the plaintiff was an irrelevant consideration. The plaintiff had agreed to be bound by the arbitration clauses and these were matters
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- within the contemplation of the plaintiff at the time the agreements were executed. The plaintiff had not shown the balance of convenience in its favour. (paras 27, 28 & 29) A
- (5) In order to invoke s. 21 of the Contracts Act 1950, the mistake must be a matter of fact essential to the agreement as demonstrated in the case of *Sheikh Brothers Ltd v. Ochsner*. What was 'essential' and the 'core' in the arbitration clause itself was in fact, the agreement between the parties to arbitrate any dispute and/or differences arising from the agreements. As such, the agreement between the parties as to the venue/seat where the arbitration was to be held was merely ancillary to the 'core' agreement to arbitrate. On such premise, even if there was mistake as to the venue/seat of arbitration, such mistake was not 'essential' to the arbitration agreement within the meaning of s. 21 of the Contracts Act 1950. Further and in any event, there was no mistake within the meaning of s. 21 of the Contracts Act 1950 in the present case. It had not been shown by evidence that this was a case justifying a grant of anti-arbitration injunction. Therefore the plaintiff's application *vide* encl. 13 herein was dismissed with costs. (paras 32, 33, 34 & 35) B C D E
- (6) The courts have a general jurisdiction to grant a stay of proceedings on whatever justifiable grounds. The question must then be whether s. 10 of the Arbitration Act 2005 excludes this general jurisdiction. This was not the case. For there to be an exclusion of jurisdiction, express legislative provision to that effect must be enacted. An exclusion of jurisdiction necessarily compromises the right of access to justice and as such must be categorically provided for (*Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd.*) The language of s. 10 of the Arbitration Act 2005 does not exclude jurisdiction of the court to stay proceedings for the purpose of referring the matter to arbitration based on their agreement. Instead, the requirement to stay is generally mandatory. (paras 44 & 45) F G H
- (7) Section 3 of the Arbitration Act 2005 merely dictates the application of certain parts in the Act to both domestic and international arbitrations, where the seat of arbitration is in Malaysia. The language of the section is clear to this effect. I

- A However, s. 3 of the Act does not expressly exclude the power of the court to stay proceedings for the purpose of referring the dispute to international arbitration. It was therefore incorrect on the part of the plaintiff to suggest that
- B the Arbitration Act 2005, following s. 3, only applies to arbitration (domestic or otherwise) where the seat is in Malaysia and excludes international arbitration. The language of the section does not lend support to such interpretation. (para 46)
- C (8) The authors in The Arbitration Act 2005, UNCITRAL Model Law as applied in Malaysia have expressed the view that s. 10 of the Arbitration Act 2005 should be construed widely as to include the obligation to grant a stay of court proceedings in aid of a foreign arbitration so as to comply with Malaysia's treaty obligations under the New York Convention 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards). Even assuming s. 10 of the Arbitration Act 2005 was not applicable to international arbitration, there was nothing in the said Act to exclude the general power of the court (in Malaysia) to stay civil proceedings for any appropriate grounds including the ground to refer the dispute to an international arbitration (outside Malaysia) based on an agreement which had been agreed by the parties. The position was made clear if one was to take into consideration Malaysia's treaty obligations under the New York Convention 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Award) which requires a mandatory stay in aid of a foreign arbitration. It was the duty of this court to interpret the laws so as to comply with such Convention where Malaysia is a party, unless expressly prohibited by law. A stay of proceeding is mandatory in order to refer the parties or the dispute to arbitration. This was also in line with the judiciary's efforts to refer disputes to arbitration or other mediation process before the matter is dealt with by the court. (paras 47, 48 & 49)
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- I (9) The arbitration agreements were within the meaning of s. 9 of the Arbitration Act 2005 and the German Code of Civil Procedure. The contention of the plaintiff that the arbitration agreement between the parties was void for uncertainty was wholly unwarranted. It was also understood and/or readily

inferred from the agreements that German Law was to the law of the agreement. Further, any objection as to the propriety of the commencement of arbitration proceedings and/or the objection as to the failure to abide by the relevant procedure on the appointment of an arbitration, was not a ground within s. 10(1)(a) and/or (b) of the Arbitration Act 2005. As such, it was not a ground upon which the court could properly exercise its power not to grant stay. In any event, such objection, if so justified, should be made to, and decided by, the arbitral tribunal, not this court. (paras 52, 57, 61 & 62)

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- (10) The facts and circumstances herein justified for a grant of stay of proceedings either under s. 10 of the Arbitration Act 2005 or under the New York Convention 1958 (Convention on the Recognition and Enforcement of Arbitral Awards). Therefore, the defendant's application for stay of the proceedings was allowed. (para 63)

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Case(s) referred to:

Ang Hiok Seng v. Yim Yut Kiu (Personal Representative Of The Estate Of Chan Weng Sun, Deceased) [1997] 1 CLJ 497 FC (**refd**)

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Black Clawson International v. Papierwerke Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep 446 (**refd**)

Castanho v. Brown & Root (UK) [1981] AC 557 (**refd**)

Compagnie d'Armement Maritime SA v. Compagnie Tunisiennne de Navigation SA [1970] 3 All ER 712 (**refd**)

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Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC (**refd**)

Fawcett Properties Ltd v. Buckingham County Council [1960] 3 All ER 503 (**refd**)

Keet Gerald Francis Noel John v. Mohd Noor Abdullah [1995] 1 CLJ 293 CA (**refd**)

Minousti Shipping Corp v. Trans Continental Shipping Services Pte Ltd [1971] 2 MLJ 5 (**refd**)

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Overseas Union Insurance Ltd v. AA Mutual International Insurance Co Ltd [1988] 2 Lloyd's Rep 63 (**refd**)

Pilecon Industrial Engineering Sdn Bhd v. Maxson Resources Ltd [2002] 1 MLJ 217 (**refd**)

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Sabah Gas Industries Sdn Bhd v. Trans Samudera Lines (S) Sdn Bhd [1993] 3 CLJ 532 HC (**refd**)

Sheikh Brothers Ltd v. Ochsner [1957] Law Reports 136 (**refd**)

The Tradesman, SA Hersent v. United Towing Co Ltd [1963] 3 All ER 661 (**refd**)

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A Legislation referred to:

Arbitration Act 2005, ss. 3, 9, 10(1)(a), 30(4)
Contracts Act 1950, ss. 21, 30
Copyright Act 1987, s. 36(3), (4)
Court of Judicature Act 1964, s. 23
Specific Relief Act 1950, s. 54(J)

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Other source(s) referred to:

Halsbury's Law of England, para 642
Pollock & Mulla on India Contract and Specific Relief Act, p 303

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*For the plaintiff - Rajendra Navaratnam (Rohan Arasoo with him);
M/s Azman Davidson & Co*
*For the defendant - Malik Imtiaz (Sonya Liew & Amelly Kok with him);
M/s YA Liew & Partners*

Reported by Suhainah Wahiduddin

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JUDGMENT

Ramly Ali J:

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[1] Enclosure 13 is the plaintiff's application for an injunction against the defendant restraining the defendant from commencing and/or further proceeding with arbitration proceedings in Germany.

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[2] In this regard, the defendant had commenced arbitration proceedings in Germany following the Arbitration Agreements and the plaintiff has been duly notified of such proceedings.

Grounds Relied By Plaintiff

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[3] The grounds relied upon by the plaintiff in support of its application are:

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(a) that the arbitration clauses as stipulated in the agreements between the parties are void for uncertainty under Malaysian law (and presumably under German law) for 'SIHK' referred to in these agreements could mean many different institutions. In essence, the plaintiff contends that there is serious question as to the 'venue' of arbitration;

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(b) the law of the agreements should be Malaysian law; and/or
(c) that the appointment of arbitrator was invalid.

[4] The plaintiff further contends that the balance of convenience sways in favour of a grant of injunction on the basis that:

- (a) the arbitration would proceed to be conducted under an unfavourable system of laws (German); and
- (b) the arbitration will involve great expenses being incurred by the plaintiff.

[5] Further and in any event, the plaintiff argues that the Malaysian Courts have the jurisdiction to hear the dispute.

Grant Of Anti-Arbitration Injunction

[6] The well established law that the jurisdiction of the High Court to grant injunctions, whether interlocutory or final, is confined to injunctions granted for the enforcement or protection of some legal or equitable right applies also to applications for injunctions to restrain arbitration proceedings as it does to other injunctions.

[7] The circumstances under which arbitration proceedings have been restrained are:

- (a) where the contract containing the arbitration agreement is invalid or where there is a challenge to its validity;
- (b) where the point at issue between the parties is so clear that there could not properly be said to be a dispute;
- (c) where the reference has been terminated by agreement, express or implied; and/or
- (d) where the arbitration agreement referring to a specific arbitrator, and he is disqualified by reason of corruption or bias. (see: *Halsbury's Law of England*, para 642).

[8] In addition to the above, the Malaysian court in *Pilecon Industrial Engineering Sdn. Bhd. v. Maxson Resources Ltd.* [2002] 1 MLJ 217 has restrained arbitration proceedings on the ground that there is a serious question to be tried as to the venue and the governing law of the arbitration.

A Exercise Of Discretion

[9] The court must always exercise caution in exercising jurisdiction to restrain foreign arbitration proceedings. The same principles as to injunctions restraining foreign court proceedings apply, (see: *Halsbury's Laws of England*, para 642; *Black Cloawson International v. Papierwerke Waldhof-Ascjaffenburg AG* [1981] 2 Llyod's Rep 446).

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[10] In order to restrain foreign arbitration proceedings, an applicant must satisfy the court that:

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(a) there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense; and

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(b) the stay must not deprive the respondent of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the court.

(see: *Castanho v. Brown & Root (U.K.)* [1981] AC 557 (HL).

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[11] The applicant must also show to the court by evidence that this is a case justifying a grant of an anti-arbitration injunction. (see: *Sabah Gas Industries Sdn. Bhd. v. Trans Samudera Lines (S) Sdn. Bhd.* [1993] 3 CLJ 532).

F Unclean Hands

[12] There is no basis for the court to grant, in effect, the relief prayed for by the plaintiff in the present case for the reason that the plaintiff has approached this court with unclean hands. In this regard:

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(A) *Defendant As Shareholder*

(a) the plaintiff was at all times intended to be a joint venture company in which the defendant was to be a shareholder. The defendant at all times believed that it was a shareholder of the plaintiff. The individuals behind the plaintiff, in particular Jacob George and Toralf Mueller, gave the defendant the impression that this was the case. The defendant had in fact forwarded monies to Jacob George towards the establishment cost of the plaintiff as well as its shareholding. However, the defendant to date is not a shareholder of the plaintiff, having found this out

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- only in 8 August 2006 when it instructed a company search. The plaintiff failed to disclose the fact that the defendant is not a shareholder of the plaintiff despite the Partnership Agreement reflecting this; A
- (b) the fact that the defendant is not a shareholder of the plaintiff wholly undermines the co-venturer relationship between the parties. The idea underlying the establishment of the plaintiff was to allow for the defendant to share in the benefits/profits derived from allowing the plaintiff to re-sell Comos ® PT (“Comos”) in the Asia Pacific region. The defendant not being a shareholder in the plaintiff, the defendant does not derive any such benefits/profits. B
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- (c) the defendant on the understanding that it was a shareholder supplied Comos to the plaintiff at preferential rates (Reseller Agreement) allowing for re-sale at higher rates; D
- (d) the suggestion by Jacob George that the defendant did not want to be reflected as a shareholder runs counter to the objective evidence, in particular the explicit terms of the Partnership Agreement; and E
- (e) the foregoing stands as a breach of the agreement and associated fiduciary duties owed by Jacob George and Toralf Mueller as co-venturers. F
- (B) Emulation Software/Illegal and Wrongful Circumvention Of Security Features*
- (f) Enclosure 4 which was filed on 5 September 2006, is an application by the plaintiff for an interim mandatory injunction to compel the defendant to supply Comos Products to the plaintiff pending disposal of the trial of the underlying action; G
- (g) the filing of encl. 4 shows that the plaintiff understood that it required an order from this court for interim relief. It shows therefore that the plaintiff was aware that ‘self-help’ was not available to it; H
- (h) Comos is secured by a “licence file” which restricts access. An authorised user would need a further software called a ‘dongle’ to operate the secured Comos. Without a dongle, Comos could not be operated. The licence file and the dongle are security features; I

- A** (i) The plaintiff circumvented the security features. Such circumstances is a breach of the copyright of the defendant in Comos and in contravention of ss. 36(3) and/or (4) of the Copyright Act 1987.
- B** (j) The circumvention was effected as follows:
- C** (i) from on or about 5 August 2006 (ie, before the plaintiff even filed the application for the injunction), the plaintiff began the process of building an emulation software ie, a software that would allow it to imitate the dongle;
- (ii) on or about 9 August 2006, the source codes for the emulation software was paid for (to a Russian individual) by the plaintiff;
- D** (iii) the emulation software was used for the purpose of purportedly issuing a licence for Comos to MMC Oil & Gas Engineering Sdn. Bhd. ("MMC") in or about 19 September 2006. The unauthorised sale and/or use was disguised as a sale of myCIS;
- E** (iv) the emulation software was again used on or about 2 October 2006 for the purposes of allowing TJSB unauthorised access to Comos;
- F** (v) the foregoing is documented and direct evidence of the same has been given. This is illustrated by an e-mail written internally on 8 December 2006 where the 'emulator' is specifically referred to;
- G** (vi) further, the use of emulation software has been corroborated by independent verification in Germany through access to specific servers. The use of emulation software has been made the subject of police investigations in Germany;
- H** (vii) on 11 January 2007 the defendant obtained an injunction restraining use of the emulation software and to authorise a search of the premise of the plaintiff in D2-22-27-2007.
- (k) In view of the foregoing, the plaintiff has approached this court with unclean hands in that:
- I** (i) the plaintiff did not disclose its use of the emulation software and the wrongful sales/access to Comos;

(ii) the plaintiff did not disclose that it had acted in contravention of the Copyright Act 1987; and A

(iii) the plaintiff has through Jacob George purported to justify the use of the emulation software as a necessity despite the pending application in encl. 4. Further, the explanation offered is not consistent with the objective evidence and is therefore intentionally misleading. B

(see: 54(J), Specific Relief Act 1950). *Ang Hiok Seng @ Ang Yeok Senga v. Yim Yut Kiu (Personal Representative Of The Estate Of Chan Weng Sun, Deceased)* [1997] 1 CLJ 497. C

Bona Fide Serious Question To Be Tried

[13] It is apparent that the facts and circumstances of the case herein do not fall within any of the circumstances under para 7 above. In this regard: D

(a) there is no challenge as to the validity of the contract containing the arbitration agreement. The challenge herein is specific to the arbitration agreements/clauses in the contract; E

(b) the plaintiff has not challenged as to the existence of dispute and/or differences between the parties;

(c) there has not been termination of reference to arbitration by either parties; and F

(d) there is no question in respect of the disqualification of a or any 'specific arbitrator'.

[14] The primary contention of the plaintiff, or the serious question(s) to be tried as contended, are in relation to: G

(a) the venue of arbitration;

(b) the applicable law to the Agreements; and

(c) the appointment of arbitrators. H

(A) Venue of Arbitration

[15] The plaintiff contends that the arbitration clauses as stipulated in the agreements between the parties are void for uncertainty under Malaysian law (and presumably under German law). This is for the reason that the term 'SIHK' referred to in I

A these agreements could mean many different institutions. The plaintiff in fact, relying on s. 30 of the Contracts Act 1950, in which agreements are void where the meaning is:

(a) not certain; or

B (b) not capable of being made certain.

(see: s. 30, Contracts Act 1950).

C [16] The law is such that in construing an agreement, the court should not hold a provision to be void for uncertainty unless it cannot resolve the ambiguity which it is said to contain. (see: *Fawcett Properties Ltd. v. Buckingham County Council* [1960] 3 All ER 503).

D [17] The court finds that it is apparent to the defendant, and it would be to the plaintiff as well, that the term 'SIHK' refers to Sudwestfälische Industrie- und Handelskammer or the Chamber of Industry and Commerce of Southern Westphali. There is as such, no uncertainty as to whether 'SIHK' refers to the other localities as identified by the plaintiff.

E [18] Even if the seat of arbitration is uncertain it is capable and/or readily of being made certain with reasonable certainty. In this regard, a contract of which there can be more than one meaning or which when construed, can produce in its application, more than one result, is not void for uncertainty – so long as the language is not so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention. (see: *Pollock & Mulla on Indian Contract and Specific Relief Acts*, commentary on s. 29 (in *pari materia* with s. 30 of the Malaysian Contracts Act), p. 303).

H [19] The facts herein are as such that the precise seat of arbitration can be made certain with reasonable certainty, to refer to Sudwestfälische Industrie- und Handelskammer or the Chamber of Industry and Commerce of Southern Westphalia. In this regard:

I (a) The defendant has understood 'SIHK' to mean at all times as referring to the Sudwestfälische Industrie- und Handelskammer or the Chamber of Industry and Commerce of Southern Westphalia, as:

- (i) the law of the agreements is German Law; A
- (ii) the arbitration clause meets the formal requirements of the German code of Civil Procedure;
- (iii) the manner in which the parties transacted were reflective of German law; B
- (iv) the main focus of the relations between the parties lay in the Federal Republic of Germany where the defendant is established. The operations of the defendant are primarily in Schwelm and Bonn. The Hagen arbitration venue provided for by the Westphalian Chamber is located close to Schwelf a and Bonn and the said Chamber is viewed by the commercial and industrial community in Southern Westphalia as being the most suited for dispute resolution; C
- (b) the other localities identified by the plaintiff in interpreting 'SIHK' have no bearing on the relationship between the parties; D
- (c) though the OEM Agreement referred to by the plaintiff contains an arbitration clauses referring to arbitration in Singapore, the same has no bearing herein as the plaintiff was not a party in the OEM Agreement. Parties to OEM Agreement (which in any event, had been superceded) were the defendant and some other 3rd party, not being a party to the proceeding herein; E
- (d) the plaintiff had at no point in time ever objected to the inclusion of such arbitration clauses in the agreements; and F
- (e) the agreement have been executed by the parties on their own free will. G

[20] There being no uncertainty as to the venue of arbitration, the issue in relation to the 'venue' of arbitration therefore does not present a serious question to be tried. H

(B) Law Of Agreements

[21] In the absence of an agreement as to the substantive law applicable to an arbitration, s. 30(4) of the Arbitration Act 2005 expressly provides the arbitral tribunal the power to determine the law applicable in an arbitration by the conflict of I

- A laws rules. Thus, it is necessary and reasonably implied that the arbitrator and/or arbitral tribunal has the jurisdiction to decide on any dispute as to the law applicable in such arbitration.
- (see: s. 30(4) Arbitration Act 2005; and Commentary, The Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia, para 30.6).
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- C [22] In determining the applicable substantive law, the arbitral tribunal will infer from the circumstances the system of law with which the transaction has its closest and most real connection.
- (see: *Compagnie d'Armement Maritime SA v. Compagnie Tunisiennne de Navigation SA* [1970] 3 All ER 712; and *Minousti Shipping Corp v. Trans Continental Shipping Services Pte. Ltd.* [1971] 2 MLJ 5; where it was held that the law where the arbitration was to be held shall apply since the arbitration clause was silent as to what law should govern such arbitration proceedings).
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- E [23] In any event, the court finds that it was understood and/or it is readily inferred from the agreements that German law was to be the law of the agreements. In this regard:
- (a) there is no basis for the inference that Malaysian law is the law of the agreements and any basis for such inference
- F advanced by the plaintiff is without merit;
- (b) particular reference was made to the German Commercial Code:
- G (c) the defendant is a corporation established under the laws of Germany and having its base of operations in Germany;
- (d) the opinion by a German lawyer (Ute Klement) merely presents differing opinion in relation to the reference to arbitration and as such, the opinion offered therein shall not
- H taken as conclusive;
- (e) the plaintiff's contention that particular reference was made to the applicability of German Law in the Revised Agreements but not in the agreements, are irrelevant to the issue for the
- I reason that the Revised Agreements were never executed by the parties. Even if such is relevant, the court finds that it would lend support to the defendant's argument that it has

always been the intention of parties that the governing law shall be that of German law. The Revised Agreements were at all material times, intended to improve the relationship between the parties. As such, it should not be taken against the defendant.

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[24] It is therefore held that the issue of applicable laws would not present a serious question to be tried.

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(C) Appointment Of Arbitrator

[25] All procedures in the German Code of Civil Procedure in respect of the appointment of arbitrator have been duly complied with. A complaint has been registered with SIHK. It is now for SIHK to take all necessary further steps including those going to the appointment of arbitrator.

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[26] The issue of validity of appointment of arbitrator would not present a serious question to be tried.

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Balance Of Convenience

[27] There is, and would have, no question of there being an application of an “unfavourable system of law”. This is a spurious suggestion by the plaintiff and is wholly unsubstantiated.

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[28] That the arbitration will involve great expenses being incurred by the plaintiff is an irrelevant consideration for:

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(a) the plaintiff had agreed to be bound by the arbitration clauses; and

(b) these were matters within the contemplation of the plaintiff at the time the agreements were executed.

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[29] The plaintiff has not shown the balance of convenience in its favour.

[30] Any inconvenience that would be suffered by the plaintiff can be compensated with costs.

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Mistake

[31] The plaintiff had sought to raise an alternative argument that the arbitration clause in the agreements are void for “both the parties to the agreements are under a mistake as to a matter of fact essential to the agreement”. The plaintiff is relying on s. 21 of the Contracts Act 1950.

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- A [32] The case of *Sheikh Brothers Ltd. v. Ochsner* [1957] Law Reports 136 demonstrates that in order to invoke s. 21 of the Contracts Act, the mistake must be a matter of fact essential to the agreement. What is ‘essential’ and the ‘core’ in the arbitration clause itself is in fact, the agreement between the parties to
- B arbitrate any dispute and/or differences arising from the agreements. As such, the agreement between the parties as to the venue/seat where the arbitration is to be held is merely ancillary to the ‘core’ agreement to arbitrate.
- C [33] On such premise, the court is of the view that even if there is mistake as to the venue/seat of arbitration, such mistake is not ‘essential’ to the arbitration agreement within the meaning of s. 21 of the Contracts Act 1950.
- D [34] Further and in any event, there is no mistake within the meaning of s. 21 of the Contracts Act 1950 in the present case. There is no basis to the plaintiff’s contention that it has always understood the abbreviation ‘SIHK’ to refer to the arbitration in Singapore based on the Software OEM Distribution and Strategic Alliance Agreement (the “ALCIM OEM Arrangement”).
- E In this regard:
- (a) in the Alcim OEM Agreement, no specific reference was made to ‘SIHK’. Reference was merely made to ‘arbitral Court of Singapore’. The relevant arbitration clause is reproduced as
- F follows:
- G ARBITRATION CLAUSE: Court of arbitration in case of litigation resulting from this contract or a contract related to this contract, is the arbitral Court of Singapore under exclusion of legal process. In case the partner initiates a fact-finding, the Court of arbitration or the foreign chamber of commerce will be responsible. Excluded of the arbitration clause are the attached contracts.
- (b) Therefore, it should not be used as a basis for the plaintiff in
- H the present case to now contend that it was under an impression that any arbitration is to be carried out in Singapore.

Conclusion On encl. 13

- I [35] It has not been shown by evidence that this is a case justifying a grant of an anti-arbitration injunction.

[36] Further and in any event, the court is also satisfied that the test applicable in an application for injunction has not been satisfied. (see: *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah* [1995] 1 CLJ 293. A

[37] Therefore the plaintiff's application *vide* encl. 13 herein is dismissed with costs. B

Enclosure 21

[38] Enclosure 21 is the defendant's application for stay of proceedings herein pursuant to s. 10 of the Arbitration Act 2005. C

[39] The subject of the dispute between the parties herein are in relation to a Partnership Contract and Resellers Agreement both dated 2 March 2005 and to both of which the plaintiff and the defendant were parties. D

[40] The plaintiff contends that the defendant has acted in breach of the agreement and has filed the underlying action with a view to compelling performance of the agreements. The issues arising from the underlying action are issues falling within the scope of the arbitration agreements. E

Mandatory Stay: s. 10, Arbitration Act 2005

[41] The Arbitration Act 2005 (the new Act) came into force on 15 March 2005. The power of the court to grant a stay of proceedings is as provided under s. 10 of the Act. Pursuant to this new provision, the general discretion vested in the court to stay court proceedings is no longer available. Instead, the requirement to stay is mandatory, on an application by a party before taking any other steps in the proceedings, unless the court finds either that: F G

- (a) the agreement is null and void, inoperative or incapable of being performed; or
- (b) there is in fact no dispute between the parties with regard to the matters to be referred. H

[42] Section 10, Arbitration Act 2005 provides as follows:

- (1) A Court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds: I

- A (a) that the agreement is null and void, inoperative or incapable of being performed; or
- (b) that there is in fact no dispute between the parties with regard to the matters to be referred.
- B (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
- (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the Court.
- C

[43] The plaintiff submits that the defendant's application herein, pursuant to s. 10 of the Arbitration Act 2005, is misconceived, in the predominant ground that the Act does not apply to arbitration held outside Malaysia.

D

No Express Exclusion In s. 10

- [44] The defendant submits that the jurisdiction to grant a stay is vested under s. 23, Court of Judicature Act ("CJA"). Any analysis must start on the footing that the courts do have a general jurisdiction to grant a stay of proceedings on whatever justifiable grounds. The question must then be whether s. 10 of the Arbitration Act 2005 excludes this general jurisdiction. The court is of the view that this is not the case. For there to be an exclusion of jurisdiction, express legislative provision to that effect must be enacted. An exclusion of jurisdiction necessarily compromises the right of access to justice and as such must be categorically provided for.
- E
- F
- G (see: *Danaharta Urus Sdn. Bhd. v. Kekatong Sdn. Bhd.* [2004] 1 CLJ 701).

[45] The language of s. 10 of the Arbitration Act 2005 does not exclude jurisdiction of the court to stay proceedings for the purpose of referring the matter to arbitration based on their agreement. Instead, the requirement to stay is generally mandatory.

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[46] Section 3 of the Arbitration Act 2005 merely dictates the application of certain Parts in the Act to both domestic and international arbitrations, where the seat of arbitration is in Malaysia. The language of the section is clear to this effect. However, s. 3 of the Act does not expressly exclude the power of the court to stay proceeding for the purpose of referring the

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dispute to international arbitration. It is therefore incorrect and erroneous on the part of the plaintiff to suggest that the Arbitration Act 2005, following s. 3, only applies to arbitration (domestic or otherwise) where the seat is in Malaysia and excludes international arbitration. The language of the section does not lend support to such interpretation.

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[47] The authors in The Arbitration Act 2005, UNCITRAL Model Law as applied in Malaysia have expressed the view that s. 10 of the Act should be construed widely so as to include the obligation to grant a stay of court proceedings in aid of a foreign arbitration so as to comply with Malaysia's treaty obligations under the New York Convention 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards). In this regard, the New York Convention 1958 requires a mandatory stay to be provided for where the arbitration is to be held in a Convention country. Both Malaysia and Germany are convention countries to the New York Convention 1958.

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[48] Even assuming s. 10 of the Arbitration Act 2005 is not applicable to international arbitration (where the seat is outside Malaysia), the court is of the view that there is nothing in the said Act to exclude the general power of the court (in Malaysia) to stay civil proceedings for any appropriate grounds including the ground to refer the dispute to an international arbitration (outside Malaysia) based on an agreement which had been agreed by the parties. The position is made clear if one is to take into consideration Malaysia's treaty obligations under the New York Convention 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Award) which requires a mandatory stay in aid of a foreign arbitration. Being the court of the country it is the duty of this court to interpret our laws so as to comply with such Convention where Malaysia is a party, unless expressly prohibited by law.

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[49] Be it under s. 10 of the Arbitration Act 2005 or under the New York Convention 1958, a stay of proceeding is mandatory in order to refer the parties or the dispute to arbitration. This is also in line with the judiciary's efforts to refer disputes to arbitration or other mediation process before the matter is dealt with by the court.

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A The Plaintiff's Objection For Stay Application

[50] The grounds relied upon by the plaintiff in objecting stay application herein are as follows:

- B**
- (a) that the arbitration clause is void for uncertainty;
 - (b) the law of the agreements should be Malaysian law; and/or
 - (c) the defendant had failed to abide by the relevant procedure on the appointment of an arbitrator.

- C**
- [51] Following the above, it appears that the plaintiff is relying only on s. 10(1)(a) of the Arbitration Act 2005. The plaintiff has not challenged as to the existence of dispute between the parties.

Valid Arbitration Agreement

- D**
- [52] The Arbitration Agreements are readily found in all agreements concerned. They are arbitration agreements within the meaning of s. 9 of the Arbitration Act 2005 and the German Code of Civil Procedure. However, the plaintiff contends that the
- E**
- agreements are null and void. The plaintiff appears to be relying only on the first limb of s. 10(1)(a) of the Arbitration Act 2005, and as such, bears the burden to prove the same.

(see: *Overseas Union Insurance Ltd. v. AA Mutual International Insurance Co. Ltd.* [1988] 2 Lloyd's Rep 63 at 70).

- F**
- [53] An arbitration agreement is null and void if it is void *ab initio*. It does not include a merely voidable agreement.

(see: *The Tradesman, SA Hersent v. United Towing Co. Ltd.* [1963] 3 All ER 661).

- G**
- [54] The plaintiff's reasons in contending that the agreements between the parties are void for uncertainty under Malaysia law (and presumably under German law) for the seat of arbitration referred to in the agreements, ie, the term 'SIHK', could mean
- H**
- many different institutions. The plaintiff is in fact, relying on s. 30 of the Contract Act 1950, in which agreements are void where the meaning is:

- I**
- (a) not certain; or
 - (b) not capable of being made certain.

[55] The court has earlier stated in these grounds of judgment that in construing an agreement, a court should not hold a provision to be void for uncertainty unless it cannot resolve the ambiguity which it is said to contain. A

(See: *Fawcett Properties Ltd. v. Buckingham County Council* [1960] 3 All ER 503). B

[56] As stated earlier, the facts herein are as such that the precise seat of arbitration can be made certain with reasonable certainty, to refer to *Suydwestfalische Industrie- und Handelskammer* or the Chamber of Industry and Commerce of Southern Westphalia. C

[57] As such, the plaintiff's contention that the arbitration agreement between the parties is void for uncertainty is wholly unwarranted. D

Law Of Agreements

[58] At the outset, the suggestion by the plaintiff that the governing law of the agreements is that of Malaysian Law, not German Law, is not a ground within s. 10(1)(a) and/or (b) of the Arbitration Act 2005. As such, it is not a ground upon which the court can properly exercises its power not to grant stay. E

[59] Notwithstanding the foregoing, in the absence of an agreement as to the substantive law applicable to an arbitration, s. 30(4) of the Arbitration Act 2005 expressly provides the arbitral tribunal the power to determine the law applicable in an arbitration by the conflict of laws rules. Thus, it is necessary and reasonably implied that the arbitrator and/or arbitral tribunal has the jurisdiction to decide on any dispute as to the law applicable in such arbitration. F G

[60] In determining the applicable substantive law, the arbitral tribunal will infer from the circumstances the system of law with which the transaction has its closest and most real connection. H

(see: *Compagnie d'Armement Marinime SA v. Compagnie Tunisienne de Navigation SA* [1970] 3 All ER 71). *Minousti Shipping Corp. v. Trans Continental Shipping Services Pte. Ltd.* [1971] 2 MLJ 5 (IAD-3, TAB#); the law where the arbitration was to be held shall apply since the arbitration clause was silent as to what law should given such arbitration proceedings). I

A [61] In any event, the court had earlier ruled that it was understood and/or it is readily inferred from the agreements that German law was to be the law of the agreement.

B [62] The court is of the view that any objection as to the propriety of the commencement of arbitration proceedings and/or the objection as to the failure to abide by the relevant procedure on the appointment of an arbitration, is not a ground within s. 10(1)(a) and/or (b) of the Arbitration Act 2005. As such, it is not a ground upon which the court can properly exercise its power not to grant stay. In any event, such objection, if so justified, should be made to, and decided by, the arbitral tribunal not this court.

Conclusion

D [63] In view of the foregoing, the court is satisfied that the facts and circumstances herein justify for a grant of stay of proceeding either under s. 10 of the Arbitration Act 2005 or under the New York Convention 1958 (Convention on the Recognition and Enforcement of Arbitral Awards).

E [64] Therefore, the defendant's application for stay of the proceeding encl. 21 is allowed with costs.

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